Supreme Court, U.S.
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CASE NO. 91-223

In The
Supreme Court of the United States

OCTOBER TERM, 1991

JUGRAJ SINGH DHALIWAL

Petitioner,

v.

WOODS DIVISION OF HESSTON CORP and DAVID SCHIRER and MICHAEL DAWSON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Decisions Of The Court Of Appeals And The District Court Are In Direct Conflict With Rule 52 Of The Federal Rules Of Civil Procedure And So Far Depart From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Power Of Supervision.

The Court of Appeals' decision and the District Court's decision are in direct conflict with Rule 52 of the Federal Rules of Civil Procedure. Rule 52(a) contains a clear and unambiguous statement that findings of fact must be set aside if they are determined to be clearly erroneous; a finding must be set aside if it is against the clear weight of the evidence. *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Grubb v. W.A. Fotte Memorial Hospital, Inc.*, 741 F.2d 1486, 1494 (6th Cir. 1984); *vacated on rehearing on other grounds*, 759 F.2d 546 (6th Cir. 1985); *cert. denied* 474 U.S., _____, 88 L.Ed.2s 284, 106 S.Ct. 342 (1985).

Here, key findings of fact were made by ignoring the evidence. There is written evidence that Respondents insisted that the not-agreed-to no application provision must be included in the agreement. There is written evidence that Petitioner had informed the Respondents that the no application provision was not agreed to on October 25, 1989. There is written evidence that the Petitioner had proposed on February 3, 1990 to settle the case out of court. This proposal was made 31 days after the parties could not reach an agreement at the second settlement conference on January 3, 1990. There is

written evidence that Respondents had declined the offer on February 7, 1990 (Appendix 1) and refused to hold a meeting to resolve the issues. The documents referred to above are in record and were presented to the lower court. The Petitioner has also submitted to the District Court testimony that has revealed that even those still employed by the Respondents state that the Petitioner had rendered consistent superior performance and that he was able to work well with other employees and to get along with them and be helpful.

Petitioner did not refuse to sign a valid contract; Respondents never submitted a valid contract. The document prepared by the Respondents contained a not-agreed-to term. Respondents admitted that the no application term was not discussed at the settlement conference on October 25, 1989. Respondents admit that they consistently took the position that the settlement agreement should be enforced with the not-agreed-to term (Brief in opposition, p. 23). Respondents had not paid the $12,000 and had failed to meet their obligation.

Respondents scheduled the second settlement conference of January 3, 1990 to include the new term. It was held in the courthouse in the presence of the Honorable Judge and was conducted in the same manner as the first conference on October 25, 1989. Respondents stood firm to make the no reapplication provision a part of the agreement, and parties could not reach an agreement. Respondents admit that the Petitioner placed his demand to change the compensation term during the discussion at the second conference, which is clearly 61 days after the Defendants' insistence on including a new term.

The Courts completely ignored the key evidence and the undisputed facts explained above and selectively choose the events out of sequence to arrive at their decisions. Some of the decisions are in conflict with their own findings. The Court of Appeal's review of the facts and events does not seem to follow any logical pattern. The Court of Appeals failure to apply Rule 52(a), which provides that courts "shall find the facts specially and state separately its conclusion of the law thereon," to this case constitutes a gross departure from the accepted course of judicial proceedings and calls for an exercise of this Court's power of supervision.

II. The Decision Of The Appellate Court Is In Direct Conflict With Its Decision In *Taylor v. Gordon Flesch Co., Inc.* 793 F.2d 858, 864 (7th Circuit 1986).

Generally, a party must unequivocally decline his/her intent not to perform his/her obligation under a contract before he/she is said to have repudiated it. *Taylor v. Flesch Co.*, 793 F.2d 858, 864 (7th Circuit 1986). This is not a rigid standard as the Appellant Court for the 7th Circuit did not itself follow this standard in the same case (*Taylor* at 864) to address the issue "whether the alternative language proposed by [defendants] repudiated the agreement." In *Taylor*, the court compared the two drafts prepared by Plaintiff's and Defendants' attorneys to find evidence of the requisite unequivocal declaration which would be capable of supporting a finding of repudiation. What that evidence should be in the Defendants' draft is not difficult to find. This evidence had to be either the addition of a not-agreed-to term or the deletion of an agreed-to material term, because the existence of the

nonmaterial terms and stylistic changes in the draft is not such an unequivocal declaration.

The Respondents other arguments based on the *Taylor* court are irrelevant in light of the fact that in *Taylor*, the court addressed this issue at the very end, on page 864. If this issue had no bearing on the court's decision, the court could have simply ignored it. Also, if the inclusion of a not-agreed-to material term in the Defendants' written draft of the oral agreement would not repudiate the oral agreement, the court could not have wasted valuable judicial time in comparing the two drafts.

In this case, the lower courts did find a not-agreed-to new material term in the Respondents' draft. Petitioner produced for the the lower courts additional written evidence, pointing out the Respondents' absolute insistence that the not-agreed-to no application provision must be included in the draft (Respondent's November 3, 1989 letter, petition page 4). Respondents admitted that the no application provision was not explicitly discussed. Respondents consistently took the position that the settlement agreement should be enforced with the above mentioned provision (Brief in opposition, p. 23).

The inclusion of a new material term in the written agreement and the absolute insistence by the Respondents on the inclusion of this term in the agreement do provide the evidence of the requisite, unequivocal declaration capable of supporting a finding of repudiation required by *Taylor* at 864. It clearly amounts to an expression by the Respondents that they did not intend to perform their obligation under the oral agreement. They had not met their obligation as they had not paid $12,000 yet. Thus, the

Respondents' inclusion of new material terms in the written expression of the oral settlement amounted to a repudiation of the oral agreement as a matter of law.

III. The Simple Unanswered Question Justifies Review Of This Case By The Highest Court Of Justice.

Where the Respondents would not accept the agreement without the not-agreed-to term and consistently took the position that the settlement agreement should be enforced with the disputed provision (Respondents brief in opposition, p. 23), how could have the Petitioner prevented the Respondents from petitioning the District Court to enforce the settlement agreement containing the not-agreed-to term and avoid attorneys' fees? Could the Agreement have been consummated if the Petitioner had not placed his demand for higher compensation? The answer is NO because the parties could not execute it from October 25, 1989, to January 3, 1990 for a period of 70 days during which Petitioner had not asked to alter the compensation term. Could the agreement have been executed if the Petitioner had withdrawn his demand for higher compensation? The answer again is NO because the agreement without the no reapplication term was not acceptable to the Respondents. Could the agreement have been consummated if the record had shown that the petitioner had agreed to the terms of the settlement agreement except for the disputed provision? The answer again is NO due to Respondents absolute insistence that the not-agreed-to no application provision must be included in the agreement (Petition, p. 4).

This agreement could have been consummated only if the Petitioner had accepted the unfair demand of the Respondents to include the not-agreed-to no application provision. This unfair demand of the Respondents to include the not-agreed-to no application provision closed all the doors for a negotiated settlement agreement.

Petitioner could not pose this question to his attorney because his (petitioner's attorney's) oral motion to withdraw was granted in the Petitioner's absence. Both the lower court's did not gave a satisfactory answer to this question because Petitioner does not possess the skills of an experienced attorney to argue this case effectively. The court of appeals for the seventh circuit has recognized this predicament of a pro-se plaintiff in *Caruth v. Pinkey* 683 F.2d 1044, 1049 (7th Cir. 1982):

> "by appointing counsel in appropriate cases, a district court not only insures that meritorious claims of the pro-se plaintiff are not defeated, but also eases the burden placed both on the district court and on this court when a skilled attorney presents a case."

That is why the Petitioner offered to pay the fees of the court-appointed attorney as required by District Court Rules 3.86 and 3.87, so that his meritorious claim would not be defeated, which has already happened in this case.

The no application provision is a new term (Opinion, Petition, p. A-23; Seventh Circuit Opinion, Petition, p. A-12). The lower courts' logic that the Respondents' action to include a new term did not amount to a repudiation whereas the Petitioner's

belated request, made 61 days after the Respondents' action to alter one existing term, did amount to a repudiation, is astonishing. After all, the Petitioner's demand for more compensation was merely an alteration in the compensation term.

Is not the Respondents' letter of November 3, 1989 (Petition, p. 4) the necessary evidence to prove that the Respondents reflected on the ORAL agreement and felt they should include the not-agreed-to no application provision in the written agreement to keep the petitioner out of their hair? If Respondents' absolute insistence that this provision must be included and their refusal to agree to a meeting to resolve this issue (February 7, 1990 letter, p. A-1) would not repudiate the contract, then what evidence would repudiate the contract? Now, it is up to highest court in the land to decide how the Petitioner could have satisfied the Respondents without accepting their demand of inclusion of a not-agreed-to no application provision in the agreement. What law had been violated by the Petitioner when he refused to sign the agreement which included a not-agreed-to provision?

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Dhaliwal 9-13-97

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LETTER from CONNOLLY, OLIVER, CLOSE & WORDEN to JUGRAJ SINGH DHALIWAL

Dated February 7, 1990

RE: Dhaliwal v. Woods Division,
Hesston Corp.,
Case No. 86 C 20375

Dear Mr. Dhaliwal:

I am writing to you in response to your letter to Henry Close. I am writing to you directly as we have not been notified that an attorney has filed an appearance on your behalf in this case.

Our client would not be interested in another meeting to attempt to resolve that matter at this time. The meeting held on January 3, 1990, was a waste of everybody's time. An agreement was reached at the settlement conference on October 25, 1989. A written settlement agreement was drafted based on that agreement and sent to you for signature. Our client is very willing to comply with the terms of that agreement. Your signature on that agreement would result in a final resolution of this case. We are not willing, however, to reopen negotiations when an agreement has already been reached.

Please feel free to contact our office again if you have questions regarding our position.

/s/ Diane R. Klock
for CONNOLLY, OLIVER, CLOSE & WORDEN

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LETTER from JUGRAJ SINGH DHALIWAL to HENRY CLOSE

Dated February 3, 1990

RE: Dhaliwal v. Woods Division, Hesston Corp.

Dear Mr. Close:

I agree with the honorable judge and you that the case has been dragging on for a very long time. I am writing this letter to assure you that I am very anxious to get it decided as soon as possible.

I believe we can also settle ourselves. I am proposing a committee consisting of you, Fred Scharer, Hank Kasper, Ed McCanse, my counsel, and myself and request you to explore the possibilities of a meeting. If you wish, you can also include Carol Long and Bo Vanman in the committee. I am planning to be in the Chicago area on February 12th and 13th, 1990. I look forward to hearing from you by Friday, February 9th, 1990 so that we can meet before attending the court.

/s/ Jugraj Singh Dhaliwal

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be mailed, with proper postage prepaid, to:

Henry J. Close
John Reardon, Jr.
CONNOLLY, OLIVER, CLOSE
& WORDEN
P.O. Box 4749
Suite 300, 124 No. Water Street
Rockford, Illinois 61110-4749

three copies of the foregoing reply to brief in opposition to petition for writ of certiorari.

Dhaliwal 9-13-91

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